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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDWARD TERRAZAS VILLA, Appellant.	2 CA-CR 2009-0372 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083740

Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Edward Villa was convicted of first-degree murder, third-degree burglary, and unlawful use of a means of transportation. The trial court imposed a

term of life imprisonment for the murder and two presumptive terms of 2.5 and 1.5 years' imprisonment for the other two charges. He raises several issues on appeal, none of which warrant reversal. Accordingly, we affirm.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding Villa's convictions, drawing all reasonable inferences in favor of the jury's verdict. *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2 (App. 2010). In March 2005, R. reported her car stolen after her friend, Villa, had borrowed it and failed to return it. Villa was arrested ten days later when a Pima County sheriff's deputy stopped him while he was driving the car, but charges against him ultimately were dismissed without prejudice.

¶3 A little over two years later, in early November 2007, law enforcement officers went to the home of then eighty-nine-year-old R. to check on her welfare after her daughter had been unable to contact her. They found the home locked, with no signs of forced entry or obvious indications of violence or theft, and no vehicle at the residence. Two days later, R.'s car was discovered in the parking lot of a grocery store. Persons in the area told officers they had noticed the car parked in different spaces within the lot throughout the week. Eight months later, a passing motorcyclist attending to a mechanical problem discovered R.'s partially mummified body in a garbage bag in a wash near Interstate 19. The wash was less than five miles from R.'s home and along the route between it and the area where her car had been found.

¶4 Early in the investigation into her disappearance, friends of R. had suggested Villa might have information on her whereabouts. Officers eventually made

contact with Villa, who subsequently met with the investigating detective on multiple occasions and also provided a DNA[1] sample. Villa discussed his friendship with R., as well as an arrangement between them wherein he helped her with small building and construction projects and also drove with her to medical appointments and other errands. He denied that R. ever had given him presents other than some glass marbles and also denied having been in her car after early October 2007.

¶5 Crime scene investigators eventually took DNA samples from the interior of R.'s car; subsequent analysis revealed that the majority of the DNA discovered on the steering wheel and all of the DNA on the gearshift matched Villa's. The detective who spoke with Villa also noted some of Villa's statements either were inconsistent with the evidence he had found or otherwise inaccurate. Additionally, the detective discovered that the temporary employment agency for which Villa worked was located across the street from the grocery store where R.'s vehicle had been found and that his storage locker was half a mile away. It was also learned that Villa's 1994 Chrysler had been impounded in early October 2007.

¶6 In September 2008, Villa, who had not been told by the officers that R. was deceased, agreed to assist in the investigation by walking through R.'s house and describing work he had done. While he was with the officers in R.'s home, he noted a display case of R.'s that had been damaged and stated, "R[.] wouldn't like that it is cracked, but I guess it doesn't make any difference now." He then agreed to come to the police station where he answered more questions and thereafter was arrested for R.'s

[1]Deoxyribonucleic acid.

murder. He was convicted and sentenced as outlined above. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 We address Villa's arguments in the order raised in his appellate brief.

Sufficiency of Evidence

¶8 Villa first contends his convictions for first-degree murder and unlawful use of a means of transportation were not supported by sufficient evidence. Our review of this issue is confined to determining "whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will reverse a conviction if "there is a complete absence of probative facts to support the verdict," such that "rational jurors could not have found the defendant guilty beyond a reasonable doubt." *State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003).

First-Degree Murder

Actus Reus

¶9 Villa first argues the state's case "was based solely on speculation and conjecture" and that it failed to prove he had killed R. He offers no authority for this portion of his argument, relying solely on three conclusory statements. First, he asserts the motives alleged by the state were not supported by any evidence. He fails, however,

to offer any explanation of why this is so. More importantly, he ignores that motive is not an element of murder and that the state is not required to prove it. *See State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983).

¶10 Second, Villa claims that, although he was the primary contributor to DNA found in R.'s car, "no evidence showed that he took possession of the car in connection with [R.'s] murder." But the state presented circumstantial evidence belying this claim. R. and her car were noticed to be missing at roughly the same time, and R.'s body was discovered next to the highway en route to the location where the car ultimately was found, which was in an area Villa frequented. *See State v. Davolt*, 207 Ariz. 191, ¶ 89, 84 P.3d 456, 477 (2004) (fact defendant found in possession of murder victim's car evidence of felony murder); *State v. Hoskins*, 199 Ariz. 127, ¶ 58, 14 P.3d 997, 1013 (2000) (possession of murder victim's property and fingerprints on property "strong circumstantial evidence" of guilt); *Cutrer v. State*, 695 S.E.2d 597, 599 (Ga. 2010) (evidence defendant had been driving victim's vehicles circumstantial evidence he also was killer); *cf. State v. McKnight*, 837 N.E.2d 315, 330 (Ohio 2005) (fact victim and vehicle disappeared at same time supported search warrant listing kidnapping as possible offense). Moreover, a witness testified R. had been afraid of Villa. And as police investigated her whereabouts, Villa's statements were inconsistent with the DNA evidence found in R.'s car, and he evinced an awareness of R.'s death before the discovery of her body had been revealed to him. Finally, some of R.'s property was found in Villa's storage locker, although he had told police she had not given him

anything apart from some marbles. Accordingly, we reject Villa's claim that his connection to R.'s car was irrelevant to R.'s murder.

¶11 To the extent we understand Villa's third argument, he appears to contend his conviction was based on certain erroneously admitted evidence, implying that without it he could not have been convicted. As we later discuss, however, *see infra* ¶¶ 31-34, the evidence he challenges was admitted properly and, in any event, it was not the sole evidence of his guilt.

Evidence of Premeditated and Felony Murder

¶12 Villa next maintains even if there was evidence he killed R., it was insufficient to establish either felony murder or premeditation. The jury did not unanimously agree whether Villa had premeditated R.'s murder or whether he had killed her in the course of a felony; accordingly, if evidence was insufficient as to either theory, Villa is entitled to reversal of his murder conviction. *See State v. Detrich*, 178 Ariz. 380, 383-84, 873 P.2d 1302, 1305-06 (1994) (if guilty verdict based in part on felony murder theory and underlying felony reversed, murder conviction must be reversed); *cf. State v. Anderson*, 210 Ariz. 327, ¶ 59, 111 P.3d 369, 385 (2005) (court does not consider sufficiency of evidence supporting felony murder when jury returns separate guilty verdict for premeditated murder). Although we find this a close question, we conclude sufficient evidence was presented to sustain Villa's conviction under either theory.

¶13 Villa asserts the "[s]tate provided no evidence whatsoever that [he] acted with premeditation" in killing R. His arguments, however, relate almost exclusively to his contention that he had no motive to kill R., a factor irrelevant to the question of

whether the crime was premeditated. *See Hunter*, 136 Ariz. at 50, 664 P.2d at 200 (motive not element of murder and state not required to prove it). To establish premeditation, the state was required to present evidence from which the jury reasonably could conclude Villa had "acted with either the intent or knowledge that he would kill [R.] and that such intent or knowledge preceded the killing by a length of time permitting reflection." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). Premeditation rarely is established by direct evidence and the state "may use all the circumstantial evidence at its disposal in a case to prove premeditation." *State v. Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d 420, 428 (2003). We conclude the state presented sufficient evidence to support a finding of premeditation based on its theory that R. was the victim of a purposeful attack and on the particular manner in which she was killed.

¶14 Circumstantial evidence supported a conclusion that Villa had formulated a plan to attack R. First, when R.'s body was recovered, she was wearing a nightgown. Trial testimony established she would not have left her home willingly without dressing, nor would she have answered the door so attired. Villa himself testified that R. would not so much as answer the telephone after she had retired for the evening. This evidence supported the conclusion that because R. had been found in her nightgown, she had neither been attacked outside her home, nor willingly admitted her killer.[2] Second, there was no sign of forced entry and the deadbolt was locked when officers arrived to

[2]When detectives searched R.'s home after her disappearance, they noted her bed was unmade and appeared to have been slept in, suggesting that the reportedly fastidious R. either may have been asleep or at least in bed when her killer arrived.

investigate, indicating the killer was someone R. knew or someone who had access to a key to her home. The state presented evidence that Villa previously had entered R.'s house when she was not there, showing she either had given him a key or he had used or copied a spare key she once had kept outside. This was substantial evidence from which the jury reasonably could have concluded that Villa had been aware of R.'s habits and purposefully had gone to her home after she had gone to bed, entered, and then attacked her. *See State v. Ellison*, 213 Ariz. 116, ¶ 70, 140 P.3d 899, 917 (2006) (evidence of premeditation when defendant knew victims and planned nighttime home invasion).

¶15 Furthermore, the manner of R.'s death itself was strong evidence of premeditation. *See Murray*, 184 Ariz. at 32, 906 P.2d at 565 (fact victims shot "execution style" circumstantial evidence of premeditation). The medical examiner concluded R. had been strangled and opined her death could have taken several minutes, a fact the jury could consider as evidence of premeditation. *See Ellison*, 213 Ariz. 116, ¶ 70, 140 P.3d at 917 (fact suffocation takes several minutes to complete shows premeditation); *see also Thompson*, 204 Ariz. 471, ¶ 32, 65 P.3d at 428 (short period of reflection between formation of intent to kill and actual killing may constitute premeditation). Moreover, when R.'s body was found, there was duct tape wrapped around her nose and mouth, suggesting that she either had been strangled first and then taped to ensure she did not regain consciousness, or that her nose and mouth had been

taped at the outset and she then had been strangled to finish the killing.[3] Either way, this manner of overkill evidences premeditation. *See State v. Summerlin*, 138 Ariz. 426, 434, 675 P.2d 686, 694 (1983) ("excessive and purposeful" violence against victim evidence of premeditation and served as "record of defendant's intent").

¶16 We also reject Villa's contention that the state presented no evidence of felony murder. To prove felony murder, the state was required to show Villa had killed R. "in the course of and in furtherance of" committing another felony. A.R.S. § 13-1105(A)(2). A killing is in furtherance of an underlying felony if death results from "any action taken to facilitate the accomplishment of the felony." *State v. Herrera*, 176 Ariz. 21, 29, 859 P.2d 131, 139 (1993). The state's theory of felony murder was that Villa had killed R. in the course of and furtherance of committing third-degree burglary of her car. The jury therefore was required to find Villa had killed R. to facilitate his "[e]ntering or remaining unlawfully in" R.'s vehicle "with the intent to commit any theft or felony therein." A.R.S. § 13-1506(A)(1) (third-degree burglary statute); *see also State v. Zinsmeyer*, 222 Ariz. 612, ¶¶ 32-33, 218 P.3d 1069, 1081 (App. 2009) (offense of third-degree burglary includes entering or remaining unlawfully in vehicle with intent to commit theft of vehicle).

¶17 Villa's argument relies on his erroneous belief that the jury was required to find that R. "tried physically to impede [his] entering the vehicle, and that [he] strangled

[3]During closing arguments, the prosecutor theorized Villa had rendered R. unconscious through strangulation and then put duct tape over her nose and mouth as "the engine of death" that killed her.

her in the process of entering the vehicle," and that absent this scenario, no felony murder conviction could be upheld.[4] Although Villa is correct that killing a victim before stealing property does not in itself constitute felony murder, *see State v. Lopez*, 158 Ariz. 258, 264, 762 P.2d 545, 551 (1988), the lack of evidence that R. engaged in a physical struggle at the time of death does not foreclose the possibility of a felony murder conviction, *see Herrera*, 176 Ariz. at 29, 859 P.2d at 139 (felony murder occurs to "facilitate the accomplishment of [a] felony").

¶18 The circumstantial evidence presented would support a conclusion that R. had been killed in the course of or to facilitate the third-degree burglary of her vehicle. Not long after Villa's car was impounded, R. and her car both went missing at the same time. During the week before R.'s car was recovered by police, several witnesses saw it parked in different places in the grocery store parking lot, indicating whoever had taken it was using it. Villa's DNA was found inside R.'s car, and his DNA was far more prevalent than R.'s, and in fact was the only DNA found on the gearshift. When R.'s car was recovered, it was clear it had been operated with a key because the steering column was not "cracked or hot[-]wired." Finally, it is significant that, although Villa testified in his own defense, the jury rejected his testimony and his defense. *See United States v. Woodard*, 459 F.3d 1078, 1087 (11th Cir. 2006) ("[A] defendant's testimony—if disbelieved by the jury—may be considered substantive evidence of guilt."); *United*

[4]We also do not necessarily agree with Villa's assumption that because R. was elderly and somewhat frail, she would not have resisted his taking her car. Because his arguments fail as a matter of law, however, we focus our discussion on the substantive legal issues as opposed to the merits of his generalization.

States v. Reed, 297 F.3d 787, 789 (8th Cir. 2002) (when other corroborative evidence of guilt exists, jury may draw inference of guilt from its disbelief of defendant's denials); *see also State v. Toney*, 113 Ariz. 404, 408, 555 P.2d 650, 654 (1976) ("Evidence is not insubstantial simply because testimony is conflicting or reasonable persons may draw different conclusions from the evidence."); *State v. Clemon*s, 110 Ariz. 555, 557, 521 P.2d 987, 989 (1974) ("The jury is not compelled to accept [the defendant's] story or believe his testimony."). We therefore reject Villa's challenge to the sufficiency of the evidence underlying his murder conviction.

Unlawful Use of a Means of Transportation

¶19 Villa also asserts the evidence was insufficient to sustain his conviction for unlawful use of a means of transportation, a charge based on his failure to return R.'s car in 2005. He cites no authority and offers no legal argument in support of this assertion. Rather, he merely reiterates some of the testimony, both relevant and irrelevant to this charge, adduced at trial. Accordingly, this argument is waived.[5] *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

[5]In any event, ample evidence supported Villa's conviction on this charge. The state was required to prove he "[k]nowingly t[ook] unauthorized control over [R.'s] means of transportation." A.R.S. § 13-1803(A)(1). At trial, Villa acknowledged he had borrowed R.'s vehicle to obtain supplies for a project R. had requested. He nevertheless retained her vehicle beyond the time he was to return it and when arrested, ten days later, he was driving the vehicle with a passenger and had been using the car for other tasks. This clearly constituted unlawful use of a means of transportation. *See State v. Griest*, 196 Ariz. 213, ¶ 5, 994 P.2d 1028, 1029 (App. 2000) (joyriding statute "broad enough to encompass a situation where the defendant first gained temporary control by permission of the owner and then 'took unauthorized control' by exceeding that authority").

Dismissal and Severance

¶20 Villa next argues the trial court abused its discretion in failing to dismiss, or in the alternative, to sever, the charge of unlawful use of a means of transportation from charges relating to R.'s murder. *See State v. Garland*, 191 Ariz. 213, ¶ 9, 953 P.2d 1266, 1269 (App. 1998) (denial of motion to sever reviewed for abuse of discretion); *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997) (denial of motion to dismiss reviewed for abuse of discretion). He contends he was entitled to dismissal based on preindictment delay and to severance because the 2005 unlawful use charge was too dissimilar to the 2007 murder and burglary charges to be tried together. We agree with the state, however, that the court did not abuse its discretion in denying both motions.

¶21 As the state points out, to warrant dismissal based on preindictment delay, a defendant must show "the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). Villa readily admits he cannot show the delay was a calculated tactic on the part of the state and, accordingly, this claim fails under *Broughton*. *See id*. He argues, however, that *Broughton* is inconsistent with the United States Supreme Court's decision in *United States v. Lovasco*, 431 U.S. 783 (1977). Even were that the case, we are bound by our supreme court's decision in *Broughton* and have no authority to disregard it. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). "'Whether prior decisions of the Arizona Supreme Court are to be disaffirmed is a question for that court.'" *Myers v. Reeb*, 190 Ariz. 341, 342, 947 P.2d 915, 916 (App.

1997), *quoting City of Phoenix*, 177 Ariz. at 378, 868 P.2d at 961. We thus find no abuse of discretion by the trial court.

¶22 Nor did the trial court abuse its discretion in refusing to sever the charge of unlawful use of a means of transportation from the remaining charges. Villa would have been entitled to severance were it "necessary to promote a fair determination of [his] guilt or innocence." Ariz. R. Crim. P. 13.4(a). He does not so argue, but rather contends the 2005 unlawful use charge would have been inadmissible as evidence in his murder and burglary trial because the state could not show by clear and convincing evidence he had committed it.[6] *See State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (evidence of prior acts must be proven by clear and convincing evidence to be admissible). He relies on the state's failure to bring charges against him in 2005 as proof there was insufficient evidence he committed the crime. But this argument is unavailing because the state's decision could have been based on any number of factors, including resource allocation or prosecutorial priorities. Assuming, however, it was because the state determined it may not have been able to secure a guilty verdict on this charge, that would not prove the state lacked clear and convincing evidence of the offense. *See State v. Turrentine*, 152 Ariz. 61, 68, 730 P.2d 238, 245 (App. 1986) (proof of guilt beyond reasonable doubt is higher standard than clear and convincing evidence standard). Additionally, Villa's argument is undercut by his being found guilty of this charge at

[6]Villa devotes significant space in his brief to describing the facts, analyses, and holdings of *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996), and *Garland*, but fails to apply these cases to the one before us. It is not the duty of an appellate court to bear the burden of analysis for an appellant.

trial, indicating the state did, in fact, prove beyond a reasonable doubt that he had committed the offense.[7]

¶23 Villa further asserts severance was required because the unlawful use charge was not substantially similar to the murder and burglary charges, claiming the only similarities between the crimes were that they both involved "the unlawful use of [R.]'s car." He cites no authority and engages in no meaningful analysis on this issue, merely concluding he is entitled to the reversal of his conviction because he disagrees with the state's theory regarding his motive. As we previously have noted, motive is not an element of murder and the state was not required to prove it. *See Hunter*, 136 Ariz. at 50, 664 P.2d at 200. In light of Villa's sparse argument, we need not address this issue further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Suppression of Statements

¶24 Prior to trial, Villa moved to suppress two statements he had made to a detective on grounds he had not been given the *Miranda* warnings.[8] When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the court's ruling. *See State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We review a trial court's denial of a motion to suppress evidence for an abuse of

[7]Without citation to authority or any analysis, Villa attempts to overcome this fact by baldly asserting, "the jury's guilty verdict on [this charge] was unquestionably influenced by the fact that [he] was also on trial for murder."

[8]*Miranda v. Arizona*, 384 U.S. 436 (1966).

discretion, deferring to its factual determinations, but reviewing de novo conclusions of law. *See State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009).

Statement on November 11, 2007

¶25 On November 11, 2007, approximately a week after R.'s disappearance, the investigating detective contacted Villa after he was arrested on outstanding traffic warrants. When the detective arrived at the scene, Villa was handcuffed and seated in the back of a police car. The detective moved Villa to the front seat of his own vehicle and removed his handcuffs. The two engaged in a "friendly" conversation during which Villa stated he was a day laborer and did not have a permanent home, but stayed in various hotels. The detective told him R. had not yet been found and asked Villa to call if he thought of anything that might help locate her. The detective later recalled Villa had seemed "concerned about [R.'s] well-being" during the conversation. Villa was thereafter transferred to the jail based on the initial warrants arrest.

¶26 The trial court denied Villa's pretrial motion to suppress his statements to the detective, finding that Villa had not been interrogated.[9] An officer "must generally advise a person 'in custody' of his *Miranda* rights . . . before questioning that person about events that may lead to criminal charges even if unrelated to the offense underlying custody." *State v. Schinzel*, 202 Ariz. 375, ¶ 24, 45 P.3d 1224, 1230 (App. 2002). Relying on *Schinzel*, Villa argues his conviction must be reversed because he was not

[9]On appeal, Villa incorrectly contends the trial court denied his motion to suppress because it determined the "interrogation was not custodial." The court actually concluded, "[i]t is clear in this case that the defendant was in custody at the time" and focused its analysis on whether he had been interrogated for purposes of *Miranda*.

advised of his rights and was questioned on an issue unrelated to his arrest.[10] But we disagree with Villa's implicit assumption that the detective's questioning could have led to criminal charges. *See id.* Although he eventually was arrested and charged with R.'s murder, the statements he made at the time he was questioned were unlikely to lead to criminal charges.[11] The detective testified that when he had spoken to Villa, he "wasn't investigating a crime" and "was trying to find a missing person." *See State v. Starr*, 119 Ariz. 472, 475, 581 P.2d 706, 709 (App. 1978) (general investigatory questioning does not require *Miranda* warnings). And, despite Villa's contention on appeal that he somehow had been compelled to talk, Villa testified he had not wanted to leave and had "just wanted to answer [the detective's] questions."[12] *Cf. State v. Sherron*, 105 Ariz. 277, 279, 463 P.2d 533, 535 (1970) (finding no custodial interrogation when suspect had invited police into apartment and voluntarily cooperated with investigation). We

[10]Contrary to Villa's assertion, this situation is markedly different from the facts of *Schinzel*. There, the defendant was present as undercover officers entered his girlfriend's apartment, physically restrained her, and arrested her. 202 Ariz. 375, ¶¶ 3, 5, 45 P.3d at 1226. After handcuffing the defendant on outstanding warrants, officers showed him various pieces of highly incriminating evidence, including drugs, drug paraphernalia, and potentially stolen checks, and asked if they belonged to him. *Id.* ¶¶ 6-8.

[11]As the state points out, Villa made no incriminating statements during the November 11 discussion and this interview ultimately was used only to impeach him at trial.

[12]We reject Villa's characterization of the encounter as somehow coercive. Such a characterization directly contradicts the trial court's factual finding that the encounter was "congenial and voluntary," which was based on both the detective's and Villa's descriptions of the encounter. *See Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d at 532 (we defer to trial court's findings); *Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d at 956 (facts viewed in light most favorable to sustaining suppression ruling).

therefore find no abuse of discretion in the trial court's determination that suppression of Villa's statement on November 11 was not warranted.

Statement on September 16, 2008

¶27 Villa similarly argues he was subjected to custodial interrogation without a *Miranda* warning when he spoke to officers nearly a year later, in September of 2008. They asked Villa to accompany them to R.'s house to "see if there was anything unusual" about it. He agreed and, as he walked through the home, "reminisc[ed]" about his friendship with R. Afterwards Villa agreed to accompany the investigating detective to the police station "to look at some photographs." At the station, Villa was cooperative and the detective's questions were "to see if [Villa] could describe . . . or explain . . . how his DNA got on [R.'s] steering wheel." Towards the end of the meeting, Villa asked if he was a suspect, and at that point concluded the interview, was read his rights, and was arrested.

¶28 Villa relies on *State v. Carrillo*, 156 Ariz. 125, 750 P.2d 883 (1988), to support his claim that he was in custody at the police station, but that case is inapposite. In *Carrillo*, police officers obtained a confession from an "intellectually-stunted defendant." *Id.* at 132, 750 P.2d at 890. To do so, they used a misdemeanor traffic warrant as a ruse to take him to the police station, and once there, "treated [him] somewhat like an arrestee," fingerprinting and photographing him before placing him in a small interrogation room. *Id.* at 132-33, 750 P.2d at 890-91. Our supreme court nevertheless found the trial court had not abused its discretion in concluding the defendant had not been in custody. *Id.* at 134, 750 P.2d at 892. Villa claims the

circumstances of his questioning were similar to those in *Carrillo*, but, unlike the defendant there, he was not informed he did not have to go to the station.[13] He maintains this failure to inform him of his right to refuse to go, combined with what he contends was a preexisting plan on the part of the detective to arrest him, caused his interview to become a custodial interrogation.

¶29 As the state points out, however, the relevant test is whether there were objective indicia of arrest. *See State v. Pettit*, 194 Ariz. 192, ¶ 13, 979 P.2d 5, 8 (App. 1998) (factors to determine whether defendant in custody include presence of objective indicia of arrest); *see also State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983) (objective indicia of arrest include use of handcuffs, display of weapon, and subjecting defendant to booking process). Villa apparently was not fingerprinted or photographed, he was not compelled to come to the station, he was not handcuffed, and he was left alone in the interrogation room with the door open while the detective interviewing him went to get him a drink. *See id.* The detective's interaction with Villa was courteous, congenial, and brief. Importantly, Villa's objective behavior demonstrated he was aware he did not have to stay and speak to the detective because when he learned he was considered a suspect, he ended the interview.

¶30 Although the fact that an investigation has focused on a particular suspect can weigh towards a finding of custody if conveyed to the suspect, *see Stansbury v.*

[13]Additionally, we see no similarities between the interrogation in *Carrillo* and the present situation. The record does not reflect or suggest Villa is a person of anything but normal intelligence, he was not tricked into coming to the station on the basis of unrelated criminal charges, and he was not treated as an arrestee once he was there.

California, 511 U.S. 318, 324 (1994); *Pettit*, 194 Ariz. 192, ¶ 13, 979 P.2d at 8, the facts here undercut Villa's claim. Even though the detective subjectively may have anticipated arresting him, Villa was neither informed nor aware of this, and therefore the detective's private expectation has no bearing on the determination of whether Villa was in custody for *Miranda* purposes. *See Stansbury*, 511 U.S. at 324 ("[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*."). Accordingly, we cannot say the trial court abused its discretion in finding this was not a custodial interrogation requiring a *Miranda* warning.[14]

Storage Locker Evidence

¶31 Villa next argues the trial court erred in admitting testimony that some items in his possession belonged to R. Officers recovered from a storage locker Villa rented various pieces of artwork and personal objects. R.'s daughter testified these items had belonged to her mother and she would not have given them away. Prior to trial, Villa challenged this evidence, contending its relevance was questionable. At trial, he again objected to evidence of the items found in his locker, asserting it was other-act evidence inadmissible pursuant to Rule 404(b), Ariz. R. Evid. The court rejected this claim and

[14]Additionally, as the state points out, Villa made no incriminating statements and the interview ultimately was used only to impeach him at trial. Even had this interrogation violated *Miranda*, a defendant's statement in violation of *Miranda* may be used for impeachment if it was made voluntarily. *See State v. Williams*, 169 Ariz. 376, 379, 819 P.2d 962, 965 (App. 1991).

overruled Villa's objection. We review its ruling for an abuse of discretion. *See State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶32 No such abuse is evident. Contrary to Villa's claim, the state did not proffer the evidence from the storage locker as evidence of "other crimes, wrongs, or acts" that arguably would have been precluded under Rule 404(b), and no reasonable reading of the record supports Villa's contention that the evidence was so used. Under Rule 404(b), the state was barred from presenting evidence of other acts to show Villa had killed R. or had stolen her car because he was the type of person who would commit such a crime. *See* Ariz. R. Evid 404(b) (other-acts evidence inadmissible to prove character of person "to show action in conformity therewith"); *State v. Stuard*, 176 Ariz. 589, 599 n.5, 863 P.2d 881, 891 n.5 (1993) (argument defendant "kind of person" who would commit crime improper under Rule 404(b)). And the state did not propose that, because Villa may have stolen from R. the items recovered from his storage locker, he necessarily stole her car.

¶33 In his opening statement, the prosecutor suggested the evidence would show that when Villa had killed R. and taken her car, he also had taken from her residence the items found in the locker. At the end of the trial, during closing arguments, the prosecutor again stated that the items had been stolen. Throughout, the prosecutor emphasized the personal nature of the items found in Villa's storage locker, further suggesting the theft was contemporaneous with the murder.[15]

[15]The items included a pewter tea service, a small Torah, a key with some Hebrew letters on it, some Swiss coins, and a watch.

¶34 Although it might have been possible for the state to have used this evidence for an improper purpose, so long as it was admissible for a proper one, there is no error. *See State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 11, 165 P.3d 238, 242 (App. 2007) (evidence inadmissible for one purpose may be admissible for another). The trial court expressly determined that evidence Villa was in possession of R.'s personal property was relevant to the charge of first-degree murder. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. The state maintained the discovery of R.'s personal property in Villa's locker, property her daughter testified she would not give away, showed potential motive to kill R., or in the alternative, a crime of opportunity after R. had been abducted and killed. This is relevant evidence of murder, *see Davolt*, 207 Ariz. 191, ¶ 89, 84 P.3d at 477 (possession of victim's property evidence of murder), and the trial court did not abuse its discretion in permitting its admission.

***Willits* Instruction**

¶35 Villa argues the trial court erred in denying him a *Willits*[16] instruction based on the state's alleged failure to preserve documentary evidence he claimed had been in his storage locker. We review the court's refusal to give a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, ¶ 39, 212 P.3d 787, 795 (2009). The instruction permits the jury to infer that missing evidence would have been exculpatory

[16]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). "To receive a *Willits* instruction, the 'defendant must show (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this failure resulted in prejudice.'" *Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795, *quoting State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995).

¶36 After Villa's arrest, police executed a search warrant on a storage locker he had rented. As noted earlier, various items belonging to R. were in the locker, as well as personal items and documents belonging to Villa. The police took custody of items relevant to its investigation and the remainder eventually were disposed of and destroyed by the storage company for nonpayment of rent. At trial, Villa testified that sales receipts for many of the items reported to belong to R. had been among the destroyed documents, and he requested a *Willits* instruction on that basis. The court denied the request, finding the state did not have control of the items, did not destroy them, and there was no way to know their exculpatory value.

¶37 Villa argues the trial court erred in denying the instruction after finding the storage company rather than the state had custody of and had destroyed the evidence. But we need not address this claim because we may uphold the court's ruling if it was correct for any reason. *See State v. Childress*, 222 Ariz. 334, ¶ 9, 214 P.3d 422, 426 (App. 2009). A *Willits* instruction is intended to remedy prejudice suffered by a defendant when the state loses or destroys potentially exculpatory evidence. *See State v. Atwood*, 171 Ariz. 576, 627, 832 P.2d 593, 644 (1992), *overruled on other grounds by*

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717 (2001). Villa argues at length that the mere possibility that lost evidence may be exculpatory is sufficient to warrant this instruction. Although we do not disagree with this basic proposition, *see Hunter*, 136 Ariz. at 50-51, 664 P.2d at 200-01, it is not clear these receipts actually existed, let alone were exculpatory. The detective who executed the search warrant testified that when he "systematically" had searched the locker, he found no receipts, although he specifically noted and documented other personal papers belonging to Villa. R.'s daughter testified that several items for which Villa claimed to have had receipts were owned by her mother. The only evidence supporting the existence of these receipts came from Villa himself after he had heard the other witnesses testify. On this record, we could not say the court abused its discretion had it denied Villa's request for failure to establish this alleged evidence actually existed.

¶38 Even assuming, however, such receipts existed, Villa still would not be entitled to a *Willits* instruction because, as the state points out, the government is only required to preserve evidence of which it is aware "where that evidence is obviously material and reasonably within its grasp." *State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984). As noted above, the investigating officer testified he "systematically" had searched Villa's storage locker. Contrary to Villa's suggestion, the evidence supports the conclusion that the officer's search was thorough and that if the receipts were there, they were not "obviously material" to the investigation. *See State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (defendant not entitled to *Willits* instruction when claim destroyed or lost files would have supported theory of case

"entirely speculative"); *see also State v. Willcoxson*, 156 Ariz. 343, 346, 751 P.2d 1385, 1388 (App. 1987) ("failure to pursue every lead or gather every conceivable bit of physical evidence" does not require *Willits* instruction); *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986) (no entitlement to *Willits* instruction when officer "had no reason to know what the defendant's defense would be"). The trial court did not abuse its discretion in failing to instruct the jury pursuant to *Willits*.

Consecutive Sentences

¶39 Finally, Villa contends the trial court committed fundamental error in ordering his burglary sentence to be served consecutively to his murder conviction, arguing such an imposition of sentences violates the constitutional prohibition against double jeopardy. Our supreme court has rejected this argument. *See State v. Martinez*, 218 Ariz. 421, ¶ 81, 189 P.3d 348, 366 (2008); *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983). We therefore do not address it further.

Disposition

¶40 For all the foregoing reasons, Villa's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge